

The opinion in support of the decision being entered today was not written for publication and is not binding precedent of the Board.

Paper No. 9

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte
Mark E. Kirby

Appeal No. 2004-1263
Application No. 09/683,029

ON BRIEF

Before WALTZ, JEFFREY T. SMITH, and PAWLIKOWSKI, Administrative
Patent Judges.

PAWLIKOWSKI, Administrative Patent Judge.

DECISION ON APPEAL

This is a decision on appeal under 35 U.S.C. § 134
from the examiner's final rejection of claims 1 through 7.

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Claim 1 is representative of the subject matter on appeal and is set forth below:

1. An apparatus for building a shower curb comprising:

a plurality of horizontally disposed boards stacked in a vertical array, said boards being cut to a common length equal to an elongate space within which is to be built said shower curb;

a flexible shower liner disposed in overlying relation to said plurality of boards;

a three-sided frame disposed in overlying relation to said boards and in overlying relation to said flexible shower liner;

said three-sided frame including a top wall, a front wall, and a back wall;

said front wall and said back wall being disposed in parallel relation to one another and in perpendicular, depending relation to said top wall;

said three-sided frame having a predetermined depth;

a plurality of openings formed in said top wall, said front wall, and said back wall;

said plurality of openings receiving a cementitious material;

said boards and liner being completely covered by said cementitious material when said cementitious material is applied to said boards and liner through said plurality of openings at a depth substantially equal to said predetermined depth of said frame so that said top wall, front wall, and back wall of said frame are substantially flush with said cementitious material;

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whereby tile is laid atop said cementitious material to complete said shower curb.

The examiner relies upon the following references as evidence of unpatentability:

Powers	5,092,002	Mar. 3, 1992
Fernandes	6,000,184	Dec. 14, 1999

Claims 1 through 7 stand rejected under 35 U.S.C. § 103 as being unpatentable over Powers in view of Fernandes.

We note that the rejection involving Powers in view of Presti has been withdrawn. Answer, page 4.

On page 3 of the brief, appellant states that the claims stand or fall together. We accordingly consider claim 1 in this appeal. 37 CFR § 1.192(c)(7) and (8) (2002).

OPINION

We have carefully reviewed appellant's arguments set forth on pages 3 through 8 of the brief. For the reasons set forth in the answer, and below, we affirm the rejection.

We refer to the examiner's position as set forth on pages 3 through 4 of the answer. The examiner relies upon Powers for teaching the apparatus as set forth in appellant's claim 1, except for teaching openings in the three-sided frame 12 for receiving a cementitious material in order to bond tiles laid atop of frame 12.

The examiner relies upon Fernandes for teaching the use of a base with openings for the installation of tiled coverings upon an underlying substrate. See column 4, lines 65 through 68. The base comprises openings 3 as depicted, for example, in Figure 1 of Fernandes. The shape of the base and the distance between the front and back surfaces of the base may vary to cooperate with the shape, texture and weight of the tiled covering to be supported by the base as well as the material and contour of the underlying substrate. See column 5, lines 36 through 42 of Fernandes.

Appellant's primary argument is that there is no motivation to substitute the base of Fernandes for the insert 12 of Powers. Appellant argues that the only motivation is found in appellant's disclosure. Brief, pages 6-8.

We refer to the examiner's comments beginning on page 5 of the answer. Here, the examiner explains that Powers discloses placing tiles 34 on the three-sided frame insert 12. The examiner states that Fernandes is relied upon for teaching how a plastic supporting frame could be provided with a plurality of openings to receive cementitious material for permitting quick attachment of tiles on the building surface. The examiner discusses how Powers, in column 3 at lines 48 through 49, teaches that the outer periphery of the inclined insert 12 is tiled with tile sections 34. See Figure 4, for example. Answer, page 5.

As discussed above, Fernandes does teach that the shape of the base can vary to cooperate with the shape, texture and weight of the tiled covering to be supported by the base as

well as the material and contour of the underlying substrate. Hence, variation of the shape of the base is suggested by Fernandes.

We note that obviousness can be established by combining or modifying the teachings of the prior art to produce the claimed invention where there is some teaching, suggesting, or motivation to do so found either in the reference or in the knowledge generally available to one of ordinary skill in the art. In re Fine, 837 F.2d 1071, 1074, 5 USPQ2d 1596, 1598 (Fed. Cir. 1988). Here, Powers' frame 12 does not include openings, as discussed above. At least part of the frame of Powers is tiled (see Fig. 4). Fernandez does teach the benefits of utilizing a base having openings for installing tile; hence, the suggestion to modify the frame of Power by including openings in the frame for improved attachment of tile is found in the reference of Fernandez. Therefore, a prima facie case of obviousness has been established. Id.

In view of the above, we therefore affirm the rejection.

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No time period for taking any subsequent action
in connection with this appeal may be extended under 35 CFR
§ 1.136(a).

AFFIRMED

THOMAS A. WALTZ)	
Administrative Patent Judge)	
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)	BOARD OF PATENT
JEFFREY T. SMITH)	APPEALS
Administrative Patent Judge)	AND
)	INTERFERENCES
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)	
BEVERLY A. PAWLIKOWSKI)	
Administrative Patent Judge)	

BAP:psb

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Smith & Hopen PA
15950 Bay Vista Drive
Suite 220
Clearwater, FL 33760